No. 15,594

In the United States Court of Appeals for the Ninth Circuit

MILTON MAYER, APPELLANT

v.

ERNEST WRIGHT, REGIONAL COMMISSIONER OF INTERNAL REVENUE SERVICE AND HAROLD HAWKINS, DISTRICT DIRECTOR OF INTERNAL REVENUE SERVICE, APPELLEES

On Appeal from the Order of the United States District Court for the Northern District of California

BRIEF FOR THE APPELLEES

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BRIEF FOR THE APPELLEES

OPINION BELOW

The District Court rendered no opinion in granting the order and judgment dismissing this case. (R. 47.)

JURISDICTION

This case originated as an action for a declaratory judgment, and an injunction to restrain the collection of federal income taxes for the years subsequent to 1952, and for a refund of 1952 taxes and interest. Payment of $99.38 was credited to taxpayer's ac-

count on March 15, 1953, a credit of $66.60 on 1952 taxes previously withheld was given to taxpayer on March 16, 1953, and the payment of $36.55 in taxes and interest was credited to taxpayer's account in April, 1954. (R. 35, 36, 43.) On December 6, 1956, taxpayer filed a complaint for a declaratory judgment, for an injunction to enjoin the collection of taxes and for a refund of taxes in the District Court. (R. 3-43.) Jurisdiction of the District Court was alleged under 28 U.S.C., "Sections 1431, *et seq*" (R. 3-4) [probably Section 1331 was intended]. Before answering, a motion to dismiss the action was filed with the District Court. (R. 46-47.) The order and judgment of the District Court dismissing the cause of action was entered on March 18, 1957. (R. 47.) On May 13, 1957, taxpayer filed his notice of appeal. (R. 48.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

Taxpayer, a conscientious objector, filed his 1952 income tax return and reported his income, but paid only part of the 1952 tax due on the ground that he, as a conscientious objector, cannot pay that part of his tax which is budgeted and expended by the Federal Government for war or for military preparation. Taxpayer filed a complaint which asked for a declaratory judgment as to his obligations for the payment of federal income taxes, which sought an injunction against the collection of that part of his income taxes for years subsequent to 1952, and which are budgeted for war purposes, and which sought a refund of half of his 1952 taxes.

The questions presented are: (1) whether taxpayer may obtain a declaratory judgment under 28 U.S.C., Section 2201, as to his obligation to pay federal taxes; (2) whether the terms of Section 7421(a) of the Internal Revenue Code of 1954 prohibit taxpayer from obtaining injunctive relief against the assessment and collection of his income taxes; (3) whether taxpayer may sue for a refund of taxes paid by him under Section 7422(a) of the Internal Revenue Code of 1954, where he failed to file prior to commencement of his suit a timely claim for refund; (4) whether taxpayer has shown that he has sustained or is immediately in danger of sustaining some direct injury as the result of the enforcement of the tax statutes so as to give to him standing to challenge the use made of his tax; (5) whether the use of tax money for defense purposes results in the unconstitutionality of the taxing statutes as interference with his free exercise of religion under the First Amendment to the Constitution.

CONSTITUTION AND STATUTES INVOLVED

Constitution of the United States:

AMENDMENT I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * *

Internal Revenue Code of 1954:

* * * *

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7421.)

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

(b) *Protest or Duress.*—Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 7422.)

28 U.S.C.:

* * * *

Sec. 2201. *Creation of remedy*

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes,

any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT

The District Court did not make any findings of fact, and the parties have not filed any stipulation of facts. The case was presented to the District Court on a complaint and attached exhibits, an affidavit to show cause and a notice of motion to dismiss. The pertinent facts as set forth in taxpayer's complaint and supporting papers appear to be as follows (R. 3-43):

Taxpayer alleges that he is a conscientious objector. (R. 4-10, 13-16, 18-20, 23-35, 39-42.) He filed his 1952 income tax return, in which he reported his income and the amount of tax due ($198.76), but paid only fifty per cent of the tax claimed to be due, i.e., $99.38, upon the ground that, as a conscientious objector he could not pay that part of his federal taxes which were "budgeted to be expended for war purposes." (R. 8, 9-10.) The Internal Revenue Service also credited taxpayer's account with an additional amount of $66.60, representing taxes withheld on taxpayer's income, leaving a net unpaid balance for 1952 of $32.78. (Exs. E, F; R. 35, 36.) Thereafter the Internal Revenue Service advised taxpayer to make payment of the balance due. (R. 10-

11.) On October 21, 1953, and April 5, 1954, warrants for distraint were issued for the unpaid balance plus interest (R. 12-13, Exs. E and F, R. 35-36) and on March 4, 1955, this unpaid balance was collected. (R. 16-17, Ex. J, R. 43).

On December 6, 1956, taxpayer filed a complaint for declaratory judgment and for injunction against the Regional Commissioner and District Director of Internal Revenue, in which he asked for a declaratory judgment as to his rights and obligations to pay "that part of his Federal Income Tax that is expended for past, present, and possible future wars"; for an injunction against "the collection of that part of plaintiff's Federal income tax for the years subsequent to 1952 that is budgeted for war purposes"; and for a refund of $103.15 in 1952 taxes withheld on his income, including the $36.55 which he paid after the warrants for distraint had been issued, and, in the alternative, that the District Court should order that fifty per cent of his 1952 and subsequent taxes which were budgeted and expended for war purposes "be placed in the General Funds of the Treasury of the United States to be expended solely for peaceful and constructive purposes." (R. 20-22.) No answer was filed. Upon motion to dismiss made by the District Director of Internal Revenue, the District Court, on March 18, 1957, issued an order dismissing taxpayer's action. (R. 46-47.)

SUMMARY OF ARGUMENT

Taxpayer does not contest his obligation to file income tax returns, to report the proper amount of

tax owed by him, or to pay taxes generally. Instead, the gist of taxpayer's position is that he disapproves of the use to which the Government makes of part of the tax monies it receives from its citizens, and, accordingly, he should not be compelled to pay that proportion of his taxes which is utilized for purposes for which he disapproves. Taxpayer seeks relief from the payment of such part of his taxes for future years, first in the form of a declaratory judgment as to his rights and obligations to make tax payments, and secondly, in the form of an injunction against the collection of such taxes for future years. Additionally, taxpayer is seeking a refund of half of the taxes paid by him for 1952. All of the relief requested is bottomed upon the supposition that the payment of taxes, where part of the budget of the Federal Government is allocated for defense purposes, impinges upon taxpayer's freedom of worship under the First Amendment to the Constitution. It is clear that taxpayer is not entitled to any of the relief sought, and that the District Court properly dismissed his complaint.

1. Section 2201 of 28 U.S.C. specifically provides that the remedy of a declaratory judgment is not available for controversies relating to federal taxes. Since the present case involves the payment of federal income taxes, taxpayer is not entitled to obtain a declaratory judgment as to his rights and obligations for the payment of past, present or future taxes.

2. Section 7421(a) of the Internal Revenue Code of 1954 provides that "no suit for the purpose of restraining the assessment or collection of any tax

shall be maintained in any court." Although this statutory prohibition has been relaxed in particular cases under extraordinary and entirely exceptional circumstances, as where it is shown that a person would suffer irreparable injury from the failure to restrain the collection of a tax and did not have any adequate remedy at law, taxpayer has failed to show the existence of any such circumstances which would warrant the granting of such an extraordinary remedy to him. To the contrary, it is clear that taxpayer's allegation, that the collection of the tax is unconstitutional, does not constitute ground for the issuance of an injunction.

3. Section 7422(a) of the Internal Revenue Code of 1954 provides that "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected * * * until a claim for refund or credit has been duly filed with the Secretary or his delegate * * *". Both the 1939 Code and the 1954 Code prescribe for the filing of claims for refund of taxes. The Government can prescribe conditions under which it consents to be sued for the recovery of taxes. These conditions are jurisdictional. They must be complied with strictly and must be established by the person invoking the jurisdiction of a District Court. Since in the present case taxpayer's complaint fails to show that he has complied with these requirements—by filing a claim for refund, it follows that his complaint failed to state a cause of action, and the District Court properly dismissed his complaint with respect to his claim for a refund.

4. Although the above reasons completely dispose of taxpayer's cause of action, there are additional grounds which support the District Court's order of dismissal. Taxpayer is seeking a determination that the collection of part of his tax is unconstitutional on the ground that it interferes with his freedom to worship under the First Amendment. It is settled, however, that a party, who invokes the power of a court to declare acts of Congress unconstitutional, must be able to show not only that the statute is invalid, but also that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. Taxpayer's sole averment of immediate danger is that payment of half the tax owed by him would deprive him of his status of a conscientious objector since such payment contributes significantly to the war effort. Clearly, the injury complained of by taxpayer is too remote to give rise to a judicial controversy sufficient to afford a basis for invoking the District Court's power, particularly where, as here, taxpayer admits that he is beyond the age which is subject to military service.

5. Congress has broad power to levy and collect taxes. It is settled that the First Amendment is not a limitation upon the tax powers of Congress, and that a conscientious objector may be compelled to pay the taxes owed by him in furtherance of the national defense. Consequently, there is not any support for taxpayer's contention that the requirement that he pay federal taxes on his income impinges upon his

freedom of worship or exercise of religion under the First Amendment.

ARGUMENT

The District Court Correctly Dismissed Taxpayer's Cause of Action

A. *The District Court was without jurisdiction to grant the declaratory judgment sought*

In his complaint, taxpayer asked the court below to grant a declaratory judgment as to his "rights and legal relations" to make "payment of that part of his Federal Income Tax that is expended for past, present, and possible future wars." (R. 20.) The court below was without jurisdiction to grant such a judgment.

Originally, the Federal Declaratory Judgment Act (Sec. 274D of the Judicial Code, as added by the Act of June 14, 1934, c. 512, 48 Stat. 955) conferred jurisdiction upon the federal courts to grant declaratory relief in cases of "actual controversy", but made no reference to cases involving federal taxes. In 1935, however, Congress amended this provision by Section 405 of the Revenue Act of 1935, c. 829, 49 Stat. 1014, expressly to except from its operation controversies "with respect to Federal taxes," and the section, as amended, currently is 28 U.S.C., Section 2201, *supra*. This action, to except cases involving federal taxes, was taken at the initiative of the Department of Justice which urged on the Senate Committee on Finance that applicability of the act to income taxes would be "a complete reversal of our present scheme of taxation" and of the essential principle "that taxpayers be required to 'pay first and litigate later.' " See Wideman, Application of the

Declaratory Judgment Act to Tax Suits, 13 The Tax Magazine 539, 540 (1935); Borchard, Declaratory Judgments 850 (2d ed., 1941). The Report of Senate Committee on Finance (S. Rep. No. 1240, 74th Cong., 1st Sess. (1935) p. 11 (1939-1 Cum. Bull. (Part 2) 651, 657)) makes it clear that the Federal Declaratory Judgment Act has no application to federal taxes, saying:

> Your committee has added an amendment making it clear that the Federal Declaratory Judgments Act of June 14, 1934, has no application to Federal taxes. The application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress (as expressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment, and collection of Federal taxes. Your committee believes that the orderly and prompt determination and collection of Federal taxes should not be interfered with by a procedure designed to facilitate the settlement of private controversies, and that existing procedure both in the Board of Tax Appeals and the courts affords ample remedies for the correction of tax errors.

This statutory prohibition against declaratory judgments in federal tax cases uniformly has been sustained, and contrary to taxpayer's contention (Br. 43-45) the statute does not permit any exception where exceptional circumstances are alleged to be present.[1] See *Martin* v. *Andrews*, 238 F. 2d 552, 554

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[1] In any event, taxpayer has not shown the existence in the present case of any exceptional circumstances.

(C.A. 9th); *Noland* v. *Westover*, 172 F. 2d 614 (C.A. 9th), certiorari denied, 337 U.S. 938; *Royce* v. *Squire*, 168 F. 2d 250, 251 (C.A. 9th); *Whetstone* v. *United States*, 82 F. Supp. 478 (N.D. Ill.), affirmed by the Seventh Circuit, April 28, 1949 (1949 C.C.H., par. 9289), certiorari denied, 337 U.S. 941, rehearing denied, 338 U.S. 840; *Wilson* v. *Wilson*, 141 F. 2d 599, 600 (C.A. 4th).

Since the issue underlying taxpayer's claim for declaratory relief is his alleged right to be relieved of the payment of part of his federal taxes, it is clear that the court lacked jurisdiction to consider this part of his claim.

B. *The District Court was without jurisdiction to enjoin the collection of federal taxes*

In his complaint taxpayer also asked for an injunction against "the collection of that part of plaintiff's Federal income tax for the years subsequent to 1952 that is budgeted for war purposes", and, in the alternative, that the District Court should order that fifty per cent of taxpayer's 1952 and subsequent taxes that "are budgeted for war and military preparation, be placed in the General Funds of the Treasury of the United States to be expended solely for peaceful and constructive purposes." (R. 21, 22.) The court below properly refused to grant such relief.

Section 7421(a) of the Internal Revenue Code of 1954, *supra*, provides as follows:

> (a) *Tax.*—Except as provided in sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collec-

tion of any tax shall be maintained in any court.[2] This provision is similar to Section 3653(a) of the 1939 Code.

Although it has been held that this statutory prohibition against maintaining a suit to restrain the assessment or collection of any tax in any court may be relaxed, this has been permitted only under extraordinary and entirely exceptional circumstances, such as a showing that the conduct of the Government's agents in assessing a tax was arbitrary or oppressive and the assessment would cause irreparable injury to the taxpayer and the taxpayer did not have any adequate remedy at law. *Miller* v. *Nut Margarine Co.*, 284 U.S. 498, 509-510; *Graham* v. *DuPont*, 262 U.S. 234; *Allen* v. *Regents*, 304 U.S. 439, 449.

On the other hand, a claim on the part of a taxpayer that he does not owe a tax, or that it has been illegally and improperly assessed, or that the collection of the tax will result in hardship to him does not constitute grounds for the issuance of an injunction. If it were not so, the whole scheme of federal taxation would be frustrated. *California* v. *Latimer*, 305 U.S. 255; *Martin* v. *Andrews*, 238 F. 2d 552 (C.A. 9th); *Phelan* v. *Taitano*, 233 F. 2d 117 (C.A. 9th); *Monge* v. *Smyth*, 229 F. 2d 361, 366-367 (C.A.

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[2] Sections 6212(a) and (c) and 6213(a) provide for the sending of deficiency notices for income, gift and estate taxes, and prohibit assessment and collection for the period thereafter during which taxpayer may petition for review by the Tax Court and while the Tax Court has the case under consideration.

9th), certiorari denied, 351 U.S. 976; *Mitsukiyo Yoshimura* v. *Alsup*, 167 F. 2d 104 (C.A. 9th); *Matcovich* v. *Nickell*, 134 F. 2d 837 (C.A. 9th); *Jewel Shop of Abbeville, South Carolina* v. *Pitts*, 218 F. 2d 692 (C.A. 4th); *Milliken* v. *Gill*, 211 F. 2d 869 (C.A. 4th); *Payne* v. *Koehler*, 225 F. 2d 103 (C.A. 8th), certiorari denied, 350 U.S. 904, rehearing denied, 350 U.S. 955; *Voss* v. *Hinds*, 208 F. 2d 912 (C.A. 10th); *Communist Party, U.S.A.* v. *Moysey*, 141 F. Supp. 332 (S.D. N.Y.); *Publishers New Press* v. *Moysey*, 141 F. Supp. 340 (S.D. N.Y.); *Schenley Distillers* v. *Bingler*, 145 F. Supp. 517 (W.D. Pa.). Even the asserted unconstitutionality of a taxing statute is not such an unusual circumstance as will afford a proper basis for an injunction. *Bailey* v. *George*, 259 U.S. 16; *Dodge* v. *Osborne*, 240 U.S. 118; *Reams* v. *Vrooman-Fehn Printing Co.*, 140 F. 2d 237 (C.A. 6th); *Voss* v. *Hinds*, *supra*.

Taxpayer's allegations (Br. 46-48), that the circumstances in the present case are sufficiently extraordinary to permit the granting of an injunction, rest solely upon the ground that his status as a conscientious objector would be lost if he were to pay his taxes, knowing that part of the taxes would be used for military purposes. He claims, in effect, that this would cause him irreparable injury even though he is presently too old to be subject to the draft, since Congress has the right to extend the draft age at any time to make him available for military service. Clearly, the extraordinary circumstances here alleged are far too speculative to warrant the granting of an injunction.

In the first place, it is clear that taxpayer had an adequate remedy at law to raise the question as to whether he must pay more than half of his taxes either by petitioning the Tax Court for a redetermination of the amount of the tax which he must pay or by paying the full amount of tax which the Commissioner claims is owing and filing refund claim and refund suit in the manner authorized by statute. In the present case there does not appear to have been any hardship for taxpayer to pay the small amount in dispute ($103.15), as is shown by the fact of his tender of the full tax on his own terms, namely, that the fifty per cent in dispute be placed in the Treasury to be expended (R. 14) "for purpose of general welfare." (R. 21, 22.) That taxpayer failed to file a timely petition with the Tax Court, or a claim for refund before instituting this suit (see Part C, *infra*), does not negate the fact that these adequate remedies at law had been available to him.

Secondly, taxpayer admits that he presently is not subject to the draft. The assertion that Congress has the right to extend the draft age and might do so at some future time so as to encompass taxpayer's future age (his present age is approximately 49 (R. 23)), is far too speculative and remote to present such extraordinary circumstances as to warrant the issuance of an injunction.

Thirdly, taxpayer has not shown that filing a petition with the Tax Court (where he would not pay the balance of the tax prior to a determination by the Tax Court that he owes that amount), or utilizing the refund procedures, would deprive him of his

conscientious objector status. To the contrary, as we shall show, Part E, *infra*, it does not appear that any conscientious objector, whether or not he is currently subject to noncombatant training and service, is privileged to refuse to pay all of the taxes owed by him.

Finally, a requirement of compliance with the conditions precedent prescribed in the taxing statutes for rectifying errors in assessment or collection of taxes—either by petitioning for a redetermination of his taxes in the Tax Court, or by using the refund procedure—bears a procedural analogy to the methods available to a conscientious objector who seeks to adjudicate his status upon induction. Such a person does not have any privilege to defy the statutes and refuse to be inducted. Instead, the proper way for him to test his status as a conscientious objector is to be inducted and then to sue for a writ of habeas corpus. *Hirabayashi* v. *United States*, 320 U.S. 81, 108; *United States* v. *Niles*, 122 F. Supp. 382 (N.D. Cal.), affirmed, *per curiam*, 220 F. 2d 278 (C.A. 9th). Thus, taxpayer, having an adequate remedy at law to test the validity of taxes may not resort to the extraordinary injunctive process.

C. *The complaint failed to state a cause of action for refund of taxes*

In his complaint taxpayer also seeks a refund of $103.15 of his 1952 taxes plus interest. (R. 21.) Nowhere in his complaint does taxpayer allege that he filed a timely claim for refund of this amount or any part of it. Accordingly, the District Court was correct on this phase of the case in granting the mo-

tion to dismiss for failure to state a claim upon which relief can be granted. (R. 46.)

The Government cannot be sued unless it gives its consent. Where it gives its consent, it can, however, prescribe the conditions upon which it can be sued, and these conditions must be complied with strictly. *Rock Island &c. R.R.* v. *United States*, 254 U.S. 141; *United States* v. *Michel*, 282 U.S. 656, 659; *Cheatham* v. *United States*, 92 U.S. 85, 89.

With respect to taxes, these conditions are found in Sections 7422(a) and 6511 of the Internal Revenue Code of 1954. Section 7422(a) of the Internal Revenue Code of 1954, *supra*, provides in relevant part as follows:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, * * * until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

It is well settled, that, insofar as Congress imposes explicit statutory requirements for the recovery of taxes, they must be observed by the person seeking the recovery. Since Congress has provided that a claim for refund must be filed within a certain time, and that no suit can be maintained until a claim has been filed, a taxpayer's failure to file a timely claim prior to instituting a suit would bar any recovery of taxes paid by him. *Angelus Milling Co.* v. *Commis-*

sioner, 325 U.S. 293, 296; *United States* v. *Felt & Tarrant Co.*, 283 U.S. 269, 272; *Phelan* v. *Taitano*, 233 F. 2d 117, 119 (C.A. 9th); *United States* v. *Standard Oil Co.*, 158 F. 2d 126, 128 (C.A. 6th); *Davis* v. *United States*, 235 F. 2d 174 (C.A. 5th); *United States* v. *Knowles*, 235 F. 2d 176 (C.A. 5th); *Ertle* v. *United States*, 93 F. Supp. 619 (C. Cls.).

D. ***The complaint failed to state a claim upon which relief can be granted since its allegations fail to set forth a justiciable controversy, and the District Court lacked jurisdiction***

Although taxpayer's cause of action was properly dismissed in all respects for the reasons given above, there are several additional grounds which support the District Court's order.

Article III, Section 1, of the Constitution vests the judicial power in the Supreme Court and such inferior courts as are established by Congress. Article III, Section 2, describes the "cases" and "controversies" to which the "judicial power" shall extend.

It has long been established that the jurisdiction of the District Courts is limited to that granted by statute within the scope of Article III, Section 2. *Lockerty* v. *Phillips*, 319 U.S. 182, 187.

The basis of taxpayer's claim for relief makes it apparent that it is outside the scope of the judicial power authorized under the Constitution, and the complaint failed to state a claim upon which relief can be granted. The gist of taxpayer's claim for relief appears to be that the federal revenues are being appropriated and expended for purposes for which taxpayer disapproves and which impinge upon the

free exercise of his religion.[3] Regardless of the merits of his assertion, we submit that this does not present a justiciable controversy and is not, therefore, a "case" or "controversy" within the jurisdiction of the federal courts under Article III, Section 2, of the Constitution. This is so for two reasons—first, taxpayer does not have sufficient interest to bring suit against the Federal Government, in that he has not shown that he has sustained or is immediately in danger of sustaining some direct injury as a result of the enforcement of the taxing statute, and secondly, that taxpayer's suit raises a political rather than a justiciable question. *Massachusetts* v. *Mellon*, 262 U.S. 447; *Whetstone* v. *United States*, *supra*.

It should be noted that taxpayer does not dispute, aside from the effect of the alleged unconstitutional appropriations, that he is liable for the payment of income taxes under the statutes imposing such taxes. (Br. 15-16, 46-47; R. 9.) Secondly, taxpayer premises his case upon the assumption that the moneys received from income taxes are not earmarked or otherwise assigned either to the appropriations condemned by him or approved by him, but are covered

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[3] In its prayer for relief the complaint requests the following relief from the District Court (R. 22):

> In the alternative that this Court orders and adjudges that 50% of plaintiff's 1952 taxes that were budgeted and expended for war and military purposes, and such parts of his Federal income tax assessed for the years subsequent to 1952 that are budgeted for war and military preparation, be placed in the General Funds of the Treasury of the United States to be expended solely for peaceful and constructive purposes.

into the general funds of the Treasury. Sections 7808 and 7809 of the 1954 Code (26 U.S.C., 1952 ed., Supp. II, Secs. 7808, 7809). Thirdly, taxpayer does not allege what portion, if any, of the expenditures made under the asserted unconstitutional appropriations are traceable to or can be related to the moneys derived from his income taxes, and it is difficult to see how this could be determined. Instead, taxpayer admits that it is impossible to assign such a portion, so that he is arbitrarily assuming that one-half of his taxes are traceable to such appropriations. (R. 9-10.) Thus, taxpayer's right or standing to contest the constitutionality of the appropriations specified appears to be based on the assertion that the taxes here involved are, to some undetermined extent, reflected in the expenditures made under those appropriations.

In *Massachusetts* v. *Mellon supra*, the Supreme Court held that a similar claim did not present a justiciable controversy and was not, therefore, a "case" or "controversy" within the jurisdiction of the federal courts under Article III, Section 2, of the Constitution. That case involved two suits. One suit was brought by the State of Massachusetts on behalf of the state and as a representative of the citizens of the state. The other suit was brought by an individual taxpayer. Both suits were brought against the Secretary of the Treasury, the Chief of the Children's Bureau of the Department of Labor, the Surgeon General of the United States Public Health Service and the United States Commissioner of Education. The suits sought to enjoin the de-

fendants from the enforcement of the so-called "Maternity Act, authorizing appropriations to the states to reduce maternal and infant mortality and to protect the health of mothers and infants, on the ground that the Act was unconstitutional. In the individual taxpayer's suit she urged that (pp. 476-477, 480):

> If these payments are made, this plaintiff will suffer a direct injury in that she will be subjected to taxation to pay a proportionate part of such unauthorized payments. She, therefore, has an interest sufficient under the practically uniform decisions of the courts of this country to enable her to maintain a proceeding to enjoin the making of these payments.
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> * * * *
>
> * * * plaintiff alleges that the effect of the statute will be to take her property, under the guise of taxation, without due process of law.

The Supreme Court disposed of both cases for want of jurisdiction for the following reasons (pp. 487-489):

> His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.
>
> The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose

several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect.

The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. *Gaines* v. *Thompson*, 7 Wall. 347. We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitu-

tional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding. Here the parties plaintiff have no such case. Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.

See also *Whetstone* v. *United States, supra; Gange Lumber Co.* v. *Rowley*, 326 U.S. 295, 305; *Manne* v. *Commissioner*, 155 F. 2d 304, 307 (C.A. 8th); *Farmer* v. *Roundtree*, 149 F. Supp. 327 (M.D. Tenn.).

The applicability of *Massachusetts* v. *Mellon*, *supra*, to the present case is evident. In both cases the asserted right to bring suit and standing in court is predicated upon the fact that each plaintiff is a taxpayer; both taxpayers admit that they are otherwise subject to tax under the revenue laws; and the basis for relief rests upon the alleged unconstitutionality of appropriations derived from moneys raised by taxes paid by each taxpayer. Furthermore, taxpayer's allegation, that he might sustain injury if he were forced to pay half his tax through a possible loss of his conscientious objector classification, is, as we have shown, Part C, *supra*, without merit. Taxpayer is not currently subject to the draft, and he has not shown that, even if he were inducted into military service as a conscientious objector, he would not remain liable for all his federal taxes. Thus, the very reason given by the Supreme Court for dismissing the suit in *Massachusetts* v. *Mellon*, *supra*, is equally applicable to taxpayer's present suit.

In any event, the constitutionality of legislation is presumed, and taxpayer has not even alleged that any part of the particular sums which he paid *actually* can be traced to expenditures for military purposes. Until he establishes that some part of the tax money collected from him was used in fact for such purposes, he has not shown that the revenue statutes were invalid restrictions upon the exercise of his religion, even on the premises upon which he bases his argument. But, as discussed in Subpoint E, *infra*, these premises are themselves completely invalid.

E. ***In imposing the income tax and providing for its collection Congress made no law respecting establishment of religion nor prohibiting the free exercise thereof in violation of the First Amendment to the Constitution***

The gravamen of taxpayer's complaint appears to be that the pertinent provisions of the Internal Revenue Code of 1939 and the Internal Revenue Code of 1954 which impose and authorize collection against him of the income tax constitute infringement of the First Amendment to the Constitution on the ground that these are statutory provisions prohibiting him in the free exercise of religion. Taxpayer does not contend that the statutes in question are unconstitutional as attempts to establish, license or regulate religion. The attack centers upon the claims that payment of the taxes, to the extent that they are spent for war purposes, involves on his part violation of his religious principles in objection to war in any form, and that to compel him to pay taxes under the circumstances is to compel him to act contrary to his religious convictions. Thereby he concludes and argues throughout his brief that the taxing statutes in question are violative of the First Amendment.[4] On the other hand, it is our contention that as a matter of law the allegations of the complaint on their face fail to state a claim that the statutes in question are unconstitutional. Hence, in addition to the reasons already given in the four preceding subpoints, on

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[4] It is not clear from the record that taxpayer's alleged religious objection to paying the full income tax represents the belief of the Quakers or of any other religious body or sect or anything except his individual view.

this ground alone the cause was properly dismissed by the District Court.

It has long been held that the Government's power to levy and collect taxes is all embracing under Article I, Section 8, of the Constitution, and that other provisions of the Constitution are not a limitation upon the tax powers, except in the rare and special instance where the tax statute is, "so arbitrary as to compel the conclusion that it does not involve an exertion of the tax power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." *Magnano Co.* v. *Hamilton,* 292 U.S. 40, 44. In *Brushaber* v. *Union Pac. R.R.,* 240 U.S. 1, the Supreme Court has stated (p. 12):

> That the authority conferred upon Congress by § 8 of Article I "to lay and collect taxes, duties, imposts and excises" is exhaustive and embraces every conceivable power of taxation has never been questioned, or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine.

See *Steward Machine Co.* v. *Davis,* 301 U.S. 548; *McCray* v. *United States,* 195 U.S. 27; *Kitagawa* v. *Shipman,* 54 F. 2d 313 (C.A. 9th).

A person may not claim exemption from the general burden of property and income taxation on the ground of religion. The First Amendment surely does not prohibit Congres from imposing general nondiscriminatory taxes. *Grosjean* v. *American Press Co.,* 297 U.S. 233, 250; *Follett* v. *McCormick,* 321 U.S. 573, 577-578; *Murdock* v. *Pennsylvania,* 319

U.S. 105, 112; *Associated Press* v. *Labor Board*, 301 U.S. 103, 132-133. See *Okla. Press Pub. Co.* v. *Walling*, 327 U.S. 186, 192-194; *Associated Press* v. *United States*, 326 U.S. 1, 7; *Lorain Journal* v. *United States*, 342 U.S. 143, 155-156; *Labor Board* v. *Virginia Power Co.*, 314 U.S. 469, 477. The tax here is not in any way laid on the exercise of religion nor does it seek to regulate or license that exercise nor is it imposed as a condition to the exercise of the religious liberties guaranteed by the First Amendment. The tax to which objection is here made was plainly imposed without discrimination upon all persons generally and is not directed to any religious activity.

In *Butler* v. *Kavanagh*, 64 F. Supp. 741, 745 (E.D. Mich.), affirmed, *per curiam*, 156 F. 2d 158 (C.A. 6th); in *Mormon Church* v. *United States*, 136 U.S. 1; and in *Shapiro* v. *Lyle*, 30 F. 2d 971 (W.D. Wash.), statutes which placed a tax upon oleomargarine, which prohibited the practice of polygamy, and which restricted the amount of wine permitted to those of the Jewish faith for sacramental purposes were held not to prohibit the free exercise of religion. In *Jacobson* v. *Massachusetts*, 197 U.S. 11, it was held that an individual cannot claim freedom from compulsory vaccination on religious grounds. In *Watchtower Bible & Tract Soc.* v. *Los Angeles County*, 181 F. 2d 739, certiorari denied, 340 U.S. 820, this Court held that a California personal property tax which was imposed alike on property of all taxpayers, including religious literature distributed by the Jehovah's Witnesses, was held not to be uncon-

stitutional as infringing on freedom of religion and press guaranteed by the First and Fourteenth Amendments. See *Communist Party, U.S.A.* v. *Moysey, supra; Publishers New Press* v. *Moysey, supra.*

Moreover, as the cases cited in the preceding paragraphs show, it has long been settled that the rights protected by the First Amendment are not absolutes and do not have the effect of permitting every citizen to be a law unto himself under the guise of even sincere religious belief. The special treatment afforded conscientious objectors with respect to military service, it is well established, does not arise from the Constitution but from Congress; it was not required by the First Amendment but, to the extent allowed, existed through the grace and in the wisdom of Congress. *Richter* v. *United States*, 181 F. 2d 591 (C.A. 9th), certiorari denied, 340 U.S. 892; *George* v. *United States*, 196 F. 2d 445 (C.A. 9th), certiorari denied, 344 U.S. 843. Furthermore, a conscientious objector does not avoid all military service; on the contrary he may be required to serve in the armed forces in a non-combative status. Universal Military Training and Service Act, c. 625, 62 Stat. 604, Sec. 6 (j), as amended by 1951 Amendments to the Universal Military Training and Service Act, c. 144, 65 Stat. 75; Sec. 1 (50 U.S.C. App., 1952 ed., Sec. 456). As Mr. Justice Cardozo pointed out in his concurring opinion [5] in *Hamilton* v. *Regents*, 293 U.S. 245, 266:

From the beginnings of our history Quakers

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[5] In this opinion Mr. Justice Brandeis and Mr. Justice (later Chief Justice) Stone joined with Mr. Justice Cardozo.

> and other conscientious objectors have been exempted as an act of grace from military service, but the exemption, when granted, has been coupled with a condition, at least in many instances, *that they supply the army with a substitute or with the money necessary to hire one.* [Italics supplied.]

Surely, since it is well established that the First Amendment does not prohibit Congress from enacting legislation requiring conscientious objectors to supply personal physical service or the army with a substitute soldier or with the money necessary to hire one, the First Amendment does not prevent Congress from raising money through taxation for the general support of the Government including the defense of the nation. As Mr. Justice Cardozo further stated in the same opinion (p. 268):

> Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

Surely, no citizen may decide for himself under the guise of religion for what purposes the public

moneys may or may not be spent or whether or not he will contribute the share imposed by Congress because he disapproves of the purpose for which it might be used.[6]

CONCLUSION

For the reasons stated, the order and judgment of the District Court dismissing taxpayer's cause were correct and should be affirmed by this Court.

Respectfully submitted,

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[6] As we have pointed out, *supra,* and contrary to taxpayer's contention (Br. 26-27), the statute does not make any invidious classification in favor of conscientious objectors of draft age. All conscientious objectors, whether or not they are serving in the armed forces, must pay their taxes.

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